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No. 05-1584

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IN THE

Supreme Court of the United States

HOUSING AUTHORITY OF JEFFERSON PARISH, *et al.*,

Petitioners,

v.

CATRICE JOHNSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MARK A. MOREAU
LAURA A. TUGGLE
NEW ORLEANS LEGAL ASSISTANCE
1010 Common, Suite 1400A
New Orleans, Louisiana 70112
(504) 529-1000

REAGAN W. SIMPSON
Counsel of Record
CHRISTIAN A. GARZA
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002
(713) 751-3200

Attorneys for Respondents

202832

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

		Page
TABLE OF CITED AUTHORITIES		iii
I.	STATEMENT OF THE CASE	1
	A. The Voucher Program	1
	B. Respondents' Allegations Below	3
	C. Dispositions in the District Court and Court of Appeals	4
II.	REASONS FOR DENYING THE PETITION	5
	A. There Is No Circuit Split	6
	B. The Court of Appeals Applied Settled Law	6
	C. The Court of Appeals Correctly Applied Settled Law	7
	1. Congress conferred a concrete right to identified individuals	7
	2. The right can be enforced by courts	9
	3. The obligation to confer the right is binding	10

Contents

Page

4. Enforcement of the right is not foreclosed by a comprehensive regulatory scheme. 10

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Page

CASES:

Alexander v. Sandoval,
532 U.S. 275 (2001) 9

Blessing v. Firestone,
520 U.S. 329 (1997) ..... *passim*

City of Rancho Palos Verdes v. Abrams,
544 U.S. 113 (2005) 6

Daubert v. Merrill Dow Pharms., Inc.,
509 U.S. 579 (1993) 10

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) ..... *passim*

Johnson v. Hous. Auth. of Jefferson Parish,
442 F.3d 356 (5th Cir. 2006) ..... *passim*

Johnson v. Hous. Auth. of Jefferson Parish,
2004 WL 2414095 (E.D. La. Oct. 28, 2004),
rev'd, 442 F.3d 356 (5th Cir. 2006) 3, 4

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) 2, 4

Wilder v. Va. Hosp. Ass'n,
496 U.S. 498 (1990) 10

Cited Authorities

Page

Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987) ..... *passim*

STATUTES & RULES:

42 U.S.C. § 1437 (2000) ..... *passim*

42 U.S.C. § 1983 (2000) 3

24 C.F.R. § 982.517 (West 2006) 3

24 C.F.R. § 982.555 (West 2006) 3, 11

H.R. Rep. No. 100-122(I) (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3317 11

FED. R. CIV. P. 12(b)(6) 2

U.S. SUP. CT. R. 10 6

TABLE OF APPENDIX

Page

Appendix — Housing Choice Voucher Program Guidebook 1a

This brief in opposition is being filed jointly by all of the respondents, who were plaintiffs below.

I. STATEMENT OF THE CASE

Respondents receive federal rent subsidies under 42 U.S.C. § 1437f(o) (2000), which established the Housing Choice Voucher Program (the "Voucher Program"). Respondents filed suit in federal district court alleging that they had not received their full subsidies, as defined by statute, because Petitioners had failed to calculate subsidies with the required allowance for tenant-paid utilities. Petitioners are the Jefferson Parish Housing Authority, its executive director, and the Louisiana Housing Development Corporation, which is under contract with the Housing Authority to operate Jefferson Parish's Voucher Program.

A. The Voucher Program.

The Voucher Program, enacted in 1988 as part of Section 8 of the Housing Act of 1937, is a tenant-based rent subsidy program. It enables low-income families to rent suitable housing in the private market, giving families flexibility in choosing housing by providing a statutorily defined "monthly assistance payment." *Id.* § 1437f(o)(2). The assistance payment is, for purposes of this suit, equal to: the amount by which the family's "rent" exceeds 30% of adjusted monthly family income, with rent expressly defined to include the "amount allowed for tenant-paid utilities." *Id.* § 1437f(o)(2)(A).[1]

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1. If a family chooses a unit renting for more than the "payment standard" (established by the housing authority in accord with

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By adopting that formula for assistance payments, Congress enabled families to secure both housing and necessary utilities that would not cost them more than 30% of their adjusted monthly family income. *Id.* § 1437f(o)((2)(A).[2] Under that statutory formula (*i.e.*, "rent" minus 30% of income), monthly assistance payments increase concomitantly with an increase in the "amount allowed for tenant-paid utilities" (included in the term "rent"). *Id.*

The "amount allowed for tenant-paid utilities" refers to the amount established by the housing authority in compliance with HUD's implementing regulations. *Id.* Congress thus incorporated into its statutory formula HUD's regulatory requirements governing utility allowances, a long-standing feature of all federal housing programs. At all times relevant to this case, the Voucher Program required an

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statutory formula based on fair rental values), the family's assistance payment is limited to the amount by which the payment standard (rather than "rent") exceeds 30% of income, in which case the housing authority's failure to employ the correct utility allowance would not affect assistance payments. *See* 42 U.S.C. § 1437f(o)(1)(A)-(B) & (2)(B) (2000). That alternative formula is not relevant here because Rule 12(b)(6) requires the Court to accept as true Respondents' allegation that they were adversely affected by the Petitioners' failure to increase the utility allowance. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999). Petitioners' argument to the contrary (Pet. at 16) improperly raises an issue not adjudicated below.

2. Section 1437f(o)(2)(A) provides two alternatives to 30% of adjusted income – namely, 10% of unadjusted monthly income and certain welfare payments allocated to housing, but both are insignificant to this case and thus are omitted for the sake of simplicity.

increase in the amount of utilities if utility rates changed 10% or more. 24 C.F.R. § 982.517(b) & (c) (West 2006) (eff. July 1994). It further mandated that the amount allowed for tenant-paid utilities reflect the "typical cost of utilities and services paid by energy-conservative households that occupy [similar] housing." *Id.* § 982.517(b)(1).

B. Respondents' Allegations Below.

Respondents filed suit under 42 U.S.C. § 1983 ("Section 1983"), alleging that Petitioners failed to calculate and provide legally required allowances for tenant-paid utilities. As a result, Respondents were required to make rent contributions that were higher than Congress intended, and they received monthly assistance payments that were lower than intended.[3] Respondents further alleged that the utility schedule for Jefferson Parish did not increase from 1995 through at least 2004, even though utility costs increased more than 10% several times during those years. *See* R. 195 at ¶ 18. Petitioners' own evidence demonstrated that their 2004 utility schedule *decreased* amounts allowed for a number of categories of utility costs. *Compare* R. 136 *with* R. 137 (1995 & 2004 utility schedules attached to affidavit of Programs Director of Petitioner Louisiana Housing Development Corporation).

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3. Respondents alleged in their second amended complaint that Petitioners failed to base their utility allowance on "typical cost of utilities . . . [of] energy-conservative households [in similar] housing." 24 C.F.R. § 982.517(b)(1) (West 2006). Although the district court refused to permit Respondents to file the amended complaint, the court did address that specific allegation. *Johnson*, 2004 WL 2414095, at *1 (App. B to Pet. at 26a).

C. Dispositions in the District Court and Court of Appeals.

Necessarily taking Respondents' allegations as true under Rule 12(b)(6),[4] the district court held that Petitioners' violations of the Voucher Program could not constitute a denial of federal rights under Section 1983. Without a hearing, the district court dismissed Respondents' claims. *Johnson v. Hous. Auth. of Jefferson Parish*, 2004 WL 2414095 (E.D. La. Oct. 28, 2004), *rev'd*, 442 F.3d 356 (5th Cir. 2006) (cited as *Johnson*) (reprinted in App. B to Pet.).

Respondents then appealed to the United States Court of Appeals for the Fifth Circuit. That court reversed in a unanimous opinion. *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356 (5th Cir. 2006) (also cited as *Johnson*) (reprinted in App. A to Pet.).

In overturning the district court, the Fifth Circuit applied the traditional test adopted in *Blessing v. Firestone*, 520 U.S. 329, 340-41 (1997) (cited as *Blessing*), to determine whether Congress intended to create an enforceable right to properly calculated monthly assistance payments in the Voucher Program. *Johnson*, 442 F.3d at 360 (App. to Pet. at 7a). The Fifth Circuit applied the test narrowly, as instructed in *Gonzaga University v. Doe*, 536 U.S. 273, 287-90 (2002) (cited as *Gonzaga*). *Johnson*, 442 F.3d at 360 (App. to Pet. at 7a-8a). Further, the Fifth Circuit validated its application of the *Blessing* test by following this Court's decision in *Wright v. City of Roanoke Redevelopment Authority*, 479 U.S. 418 (1987) (cited as *Wright*). *Johnson*, 442 F.3d at 360-63

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4. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

(App. to Pet. at 9a-13a). *Wright* held, wholly consistent with this Court's more recent decisions, that virtually identical language in the public housing program created an enforceable federal right. *See id.* at 360 (App. to Pet. at 8a).

Applying the *Blessing* test in conformity with this Court's precedents, the Fifth Circuit determined that: (1) the text of the statute at issue requires that assistance payments include an allowance for tenant-paid utilities; (2) courts can competently determine whether a housing authority has improperly calculated utility allowances; and (3) Petitioners' obligation to provide legally required assistance payments is not diminished by HUD's potential ability to waive application of utility-allowance regulations. *Id.* at 363-65 (App. to Pet. at 13a-19a). Finally, the Fifth Circuit held that a judicial remedy is not foreclosed by any comprehensive administrative enforcement scheme because, as *Wright* also held in the context of public housing, Congress has never given HUD comprehensive or exclusive powers to remedy a housing authority's violations of the Voucher Program's requirements. *Id.* at 365-66 (App. to Pet. at 19a-21a).

For those reasons, the Fifth Circuit reversed and remanded for further proceeding on the merits in the district court. Petitioners now seek this Court's review of that decision.

II. REASONS FOR DENYING THE PETITION

Petitioners request review of the Fifth Circuit's ruling that Respondents may invoke Section 1983 to seek to enforce their statutory right under a federal housing program to an accurate calculation of monthly assistance payments. That ruling, which did not address the merits of Respondents'

claim, does not justify a grant of certiorari because it does not create or deepen any conflict among the circuits. Further, the ruling is simply a case-specific and proper application of the settled legal standard that this Court articulated in such cases as *Blessing* and *Gonzaga*.

A. There Is No Circuit Split.

This Court does not ordinarily exercise review absent a circuit split. *See* U.S. SUP. CT. R. 10. Petitioners cite no split among the circuits because there is none. No other circuit has addressed whether the failure to set proper utility allowances for Voucher Program participants denies an enforceable federal right.

Nor is there any circuit conflict on the analytical approach that the Fifth Circuit employed. The Fifth Circuit applied the three-part *Blessing* test: (1) whether the statute creates an individual and enforceable benefit to the plaintiff; (2) whether the right is definite enough for courts to enforce; and (3) whether observance of the right is a binding obligation on States. *Johnson*, 442 F.3d at 360 (citing *Blessing*, 520 U.S. at 340-41) (App. to Pet. at 7a). The application of the *Blessing* test conflicts with no other circuit.

B. The Court of Appeals Applied Settled Law.

There is no circuit conflict over the *Blessing* test because it is settled law. Repeatedly, this Court has applied the test to determine whether a federal statute grants rights that an individual may enforce by a Section 1983 suit. *See, e.g., City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005); *Gonzaga*, 536 U.S. at 281, 287-90.

Further, the Fifth Circuit did not expand the application of *Blessing* beyond its boundaries. To the contrary, it distinctly recognized the "narrowness of the [*Blessing*] doctrine as typified in *Gonzaga*" and described its holding as a "rarity." *Johnson*, 442 F.3d at 360 (App. to Pet. at 7a-8a). Thus, the Fifth Circuit dispelled Petitioners' prediction that a flood of litigation will ensue. Pet. at 12. Further, the Fifth Circuit acknowledged, contrary to Petitioners' argument (Pet. at 12-14), that a right enforceable under Section 1983 must be found in the statute itself and not merely in a regulation. *Id.* at 363-64 (App. to Pet. at 15a-16a).

C. The Court of Appeals Correctly Applied Settled Law.

The Court of Appeals correctly applied each prong of the *Blessing* test. Congress intended to confer a right to Voucher Program participants; enforcement of that right lies within judicial competence; and the obligation to confer the right is binding. Further, no comprehensive enforcement scheme negates a Section 1983 suit to enforce the right. *See Blessing*, 520 U.S. 340-41.

1. Congress conferred a concrete right to identified individuals.

Congress expressly included in the statutory formula for monthly assistance payments "the amount allowed for tenant-paid utilities." 42 U.S.C. § 1437f(o)(2)(A). Thus, Congress not only anticipated HUD's implementing regulations on tenant-paid utilities, but it also adopted those regulations as part of the statutory formula. As a result, the statute expressly conferred the benefit that Petitioners denied when they failed to increase the utility schedule as HUD directed.

In addition to creating a concrete monetary right, the Voucher Program is expressly for the benefit of identified individuals. Section 1437f(o)(2) refers to "the monthly assistance payment ***for a family*** receiving assistance." *Id.* (emphasis added). The next subsection provides: "***For a family*** receiving tenant-based assistance, . . . the monthly assistance payment ***for the family*** shall be" the expressed statutory formula. *Id.* § 1437f(o)(2)(A) (emphasis added).

In holding that the above language creates enforceable federal rights, the Fifth Circuit properly followed this Court's analysis in *Wright*. *Johnson*, 442 F.3d at 360 (App. to Pet. at 8a). *Wright* was expressly approved by this Court in *Gonzaga* because the statutory language in *Wright* conferred an "individualized, concrete monetary entitlement." *Gonzaga*, 536 U.S. at 280, 288 n.6. The same entitlement is at issue here. As the Fifth Circuit noted, while the Voucher Program confers more flexibility in housing choices than the program at issue in *Wright*, the effect of denying properly calculated assistance payments is identical – namely, to force families to pay more than 30% of their income in housing costs. *Johnson*, 442 F.3d at 362 (App. to Pet. at 11a-12a). Indeed, *Wright* recognized a federal right under less compelling statutory language. The term "rent" in the statute construed in *Wright* was not, as here, statutorily defined to include tenant-paid utilities; instead, the definition was supplied only by regulation. *Wright*, 479 U.S. at 420 & n.2, 431. Therefore, *Wright* is not distinguishable in any meaningful way as Petitioners assert (Pet. at 13).[5]

5. *Wright* is not distinguishable, but Petitioners rely on cases that are. *See* Pet. at 19. In *Blessing* and *Gonzaga*, federal funding was conditioned, respectively, on the States' adoption of effective

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2. The right can be enforced by courts.

Petitioners' argument that federal courts are not competent to determine utility allowances (Pet. at 17) is simply incorrect. No special competence is needed to decide whether utility rates have increased more than 10% over the last decade. Nor is any special expertise needed to determine typical utility costs. The HUD Guidebook for the Housing Choice Voucher Program points out that "[i]nformation regarding typical utility usage and the cost of utilities and services is generally available" from a number of public sources, such as electric utility suppliers, public utility commissions, and state or local agencies.[6]

Evaluating such data is well within the competence of federal courts. This Court so held in *Wright*, which expressly rejected the argument that the concept of "'reasonable' allowance for utilities is too vague" to be enforceable (479 U.S. at 431),

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child support programs and privacy policies. *See Blessing*, 520 U.S. at 333-35; *Gonzaga*, 536 U.S. at 276. In each case, Congress used federal funding to encourage policies, but stopped short of compelling them, so that States could choose not to confer the benefits by declining federal funds. For a different reason, no federal right existed in *Alexander v. Sandoval*, 532 U.S. 275 (2001), also cited by Petitioners. Pet at 19. The statute in *Alexander* prohibited intentional discrimination. *Alexander*, 532 U.S. at 280. The plaintiff, however, was seeking relief from a State policy's disparate impact, which did not fall within the statute's prohibition. *Id.* at 278, 293.

6. U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK § 18.3 (2001). The Guidebook is available at www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm. Chapter 18 concerns allowances for utilities. Section 18.3 is quoted above and is reprinted in the appendix to this opposition.

contrary to Petitioners' assertion that the "utility allowance schedule per se was not at issue in *Wright*" (Pet. at 17).

Finally, federal courts competently address more complex issues. *See, e.g., Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 519-20 (1990) (stating that courts are competent to decide reasonable and adequate rates for hospital services); *cf. Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993) (assigning trial judges the often complex task of making "a preliminary assessment of whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue," but remaining "confident that federal judges possess the capacity to undertake this review").

3. The obligation to confer the right is binding.

Petitioners appear to argue that the obligation to increase the utility schedule with rising utility costs is not binding because HUD can waive that obligation. Pet. at 19. Yet HUD did not waive that obligation at any time in the past, and there is no evidence in the record that Petitioners have received a waiver or even applied for one. Even if such a waiver occurred in the future, it would neither remedy nor erase Petitioners' past failure to calculate monthly assistance payments in accord with existing utility allowance requirements.

4. Enforcement of the right is not foreclosed by a comprehensive regulatory scheme.

Although HUD precludes Voucher Program participants from challenging policies like the utility allowance in an

informal administrative hearing (24 C.F.R. § 982.555(b)(3)), Petitioners incorrectly seek to extend this bar to judicial challenges. Pet. at 9. Administrative preclusion is hardly a basis for prohibiting judicial enforcement of statutory rights; instead, it is a reason for allowing a suit like this one under this Court's settled jurisprudence.

Further, in *Wright*, this Court held that Congress did not create a comprehensive enforcement scheme to displace Section 1983 suits asserting the denial of federal housing assistance. *See Wright*, 479 U.S. at 423-29. That decision mirrors relevant legislative history, which confirms congressional intent to permit families receiving housing assistance to be able to bring suit under Section 1983 for violations of housing assistance programs. *See* H.R. Rep. No. 100-122(I), at 14 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 3317, 3330 (noting congressional intent to allow adversely affected tenants to bring suit under Section 1983 to enforce their statutory rights). Because Congress has similarly established no comprehensive program to displace judicial enforcement of rights conferred by the Voucher Program, the Fifth Circuit's unanimous ruling recognizing Respondents' Section 1983 claims should remain undisturbed.

CONCLUSION

The Fifth Circuit properly decided this case in accord with congressional intent expressed in clear statutory language and based on the precedents of this Court. Any hypothetical policy argument that Petitioners may posit for violating federal law (*see* Pet. at 20-21) falls far short of invoking this Court's review powers. Therefore, the Court should deny the petition.

Respectfully submitted,

REAGAN W. SIMPSON
Counsel of Record
CHRISTIAN A. GARZA
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002
(713) 751-3200

MARK A. MOREAU
LAURA A. TUGGLE
NEW ORLEANS LEGAL ASSISTANCE
1010 Common, Suite 1400A
New Orleans, Louisiana 70112
(504) 529-1000

Attorneys for Respondents

APPENDIX

APPENDIX — HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK

* * *

18.3 Establishing a Utility Allowance Schedule

When establishing a utility allowance schedule, a PHA should make every effort to base the allowances on actual rates and average consumption estimates that will be adequate to cover expected average utility costs over a twelve month period. (Like the "budget plans" available through many local utility companies, the allowances are based on an estimated full year of usage divided equally over 12 months, although the family's actual usage may fluctuate from month to month.) Information regarding typical utility usage and the cost of utilities and sewices is generally available through the following local sources:

- Electric utility suppliers
- Natural gas utility suppliers
- Water and sewer suppliers
- Fuel oil and bottled gas suppliers
- Public utility commissions
- Real estate and property management firms
- State and local agencies
- Appliance sales and leasing firms
- Neighboring PHAs

Average Consumption Data

If a PHA is unable to find adequate sources for local information regarding utility consumption, HUD will approve use of national average consumption data. These

national average consumption figures represent average amounts for an "average" 2½ bedroom unit in a locality that has approximately 4,000 heating degree days and an average local water temperature of 50 degrees. The consumption figures must be adjusted for the size of the dwelling unit. The allowances for units in the PHA's locality may need to be adjusted to reflect the higher or lower cost of utilities resulting from variations in typical outdoor temperatures and/or the temperature of the local water supply. Data on the average number of heating or cooling degree days for the locality (the sum of the number of days that the indoor temperature must be raised or lowered from the outdoor temperature level to maintain a comfortable temperature on each day for which heating or cooling is required) is generally available from the National Weather Service or other local sources. Data on the average local "degree days" will provide a basis for making local adjustments to these average consumption figures.

NATIONAL AVERAGE MONTHLY UTILITY CONSUMPTION FOR A 2½ BEDROOM DWELLING UNIT

Utility Service Category E	Fuel/Utility Units of Measurement	Consumption
I. Electricity		
a. Lighting and Refrigeration	KWH	250-400
b. Cooking	KWH	110
c. Domestic Hot Water	KWH	340
d. Space Heating	KWH	680
e. Air Conditioning	KWH	180
II. Natural Gas and Bottled Gas		
a. Cooking	Therms	8
b. Domestic Hot Water	Therms	21
c. Space Heating	Therms	48
III. Fuel Oil		
a. Domestic Hot Water	Gals.	17
b. Space Heating	Gals.	40
IV. Water		
a. Domestic Use	Gals.	8,000
b. Lawn	Gals.	2,000

Appendix

Allowances by Unit Size

Whenever possible, consumption data should be obtained for each unit size and type. If consumption data is available only for an average unit size (2½ bedrooms), the utility costs should be multiplied by the following factors to determine the costs for a specific unit size:

ADJUSTMENT FACTORS BY UNIT SIZE

Unit Size	Adjustment Factor (Times 2½ BR Monthly Consumption Figure)
0-BR	0.5
1-BR	0.7
2-BR	0.9
3-BR	1.1
4-BR	1.4
5-BR	1.6

Calculating a Utility Allowance

In the absence of reliable third-party average utility expense data, monthly utility allowances can be calculated by multiplying estimated monthly consumption times the local utility rate.

ESTIMATING UTILITY EXPENSE FROM AVERAGE CONSUMPTION DATA

The average consumption of electricity used for domestic hot water is 340 KWH.

At a scheduled rate of $.0552362 per KWH, the *average* monthly allowance for domestic hot water for a 2½ bedroom unit would be:

340 KWH x $.0552362 (rate per KWH)
= $19 (rounded to nearest dollar)

- The allowance for a 0-bedroom unit will be:

  $19 (average 2½ BR cost) x 0.5 (0-bedroom adjustment factor)
  = $10

- The allowance for a 5-bedroom unit will be:

  $19 (average 2½ BR cost) x 1.6
  (5-bedroom adjustment factor)
  = $30 (rounded to nearest dollar)

Appendix

Utility Rate Schedules

The cost of gas and electricity generally varies according to the amounts consumed, as shown on the utility suppliers' rate schedules. For this reason, it may not be possible to accurately calculate the cost for a utility in any one-service category until the usage of that utility for all service categories is known. For example, a unit with electric heating, may qualify for a lower "All-Electric" rate if electricity is also used for cooking, lighting, refrigeration, and domestic hot water. Rates for gas usage may decline with the volume of gas used, resulting in a lower cost for gas used for heating, cooking, and domestic hot water than for each use considered separately. For convenience in calculating the utility allowances for any combination of utilities, it is recommended that the PHA use the higher rates. Allowances for electric cooking, water heating, and space heating should be calculated using the lower rates at the middle or bottom of the company's rate schedule.

Ranges and Refrigerators

If rental units in the PHA' s jurisdiction are typically leased without owner-provided ranges and/or refrigerators, an allowance must be made for the cost to the family of providing its own. Allowances for tenant-provided ranges and refrigerators should be based on the lower of the cost of leasing the equipment or the cost of purchasing it on an installment plan.

Appendix

Other Utilities and Services

The utility allowance schedule should also provide allowances for all other utilities and services for which, in the PHA's locality, the tenant is typically responsible, and which are required for compliance with HQS. Examples would be firewood used as a primary heating fuel, or the required annual flushing of a septic tank in an area without public sewers.

* * * *